No. 95-1858

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENNIS C. VACCO, Attorney General of the State of New York, GEORGE E. PATAKI, Governor of the State of New York, ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D., SAMUEL C. KLAGSBRUN, M.D., and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

JOSEPH J. FRANK
SERGIO ALVAREZ-MENA, III
PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

39 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic Medical Association ("CMA") respectfully moves this Court for leave to file a brief *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of this brief. Respondents, however, have refused consent, thus necessitating the filing of this motion.

The CMA is a non-profit, public service organization founded in 1932. The CMA promotes the principles of Roman Catholic medical ethics in science and in the practice of medicine. The CMA includes more than one thousand physicians and coordinates the activities of more than 80 regional Catholic physicians' guilds in the United States and Canada.

Since 1932, the CMA has published *The Linacre Quarterly*, a leading scholarly journal on biomedical ethics. The CMA's companion Linacre Institute routinely produces studies on important medical and moral issues. The CMA also serves as a resource for the medical community, holding annual conferences where scholars and health care professionals meet and interact.

The CMA, as a potential *amicus curiae* before this Court, would contribute its professional and ethical perspective on physicians and their role in treating the terminally ill. Since its inception, the CMA has brought the practical experience and scholarly expertise of its members to bear on important societal issues. The CMA wishes to share with this Court the insights of the scholars and physicians that are its practicing members.

In addition to its own experience, the CMA hopes to inform the Court of a central theme in Catholic medical ethics, the distinction between meeting death with peace and dying at one's own hand.

For decades, Catholic religious and medical leaders have differentiated between suicide and the withdrawal of life support. In rejecting such a distinction, the Second Circuit broke from a venerable historical tradition. As a unique part of that tradition, the CMA asks for the opportunity to be heard.

The motion of the CMA for leave to file the accompanying brief *amicus curiae* in support of Petitioners should be granted.

Respectfully submitted,

JOSEPH J. FRANK
SERGIO ALVAREZ-MENA, III
PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* Counsel of Record

JUNE 1996

QUESTION PRESENTED

Whether New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment.

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BRIEF AMICUS CURIAE OF CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Catholic Medical Association ("CMA") is a national organization of Roman Catholic physicians and scholars. As more fully set forth in its motion for leave to file this brief, the CMA seeks to assist this Court by presenting the considered experience of its members, who practice daily in the field of medical ethics.

REASONS FOR GRANTING THE PETITION

"I will give no deadly medicine to anyone if asked, nor suggest any such counsel" [1]
Hippocrates of Cos
c. 410 B.C.

"Physician assisted suicide is fundamentally incompatible with the physician's role as healer" [2]
American Medical Association
1994 A.D.

From the dawn of the healing art until the present, physicians have been asked to heal rather than to kill, to save lives rather than to end them. Societies throughout history, including our own, have recognized life and its protection as an unqualified good,[3] indeed, as *the* good from which other societal goods derive.[4] Physicians serve society by maintaining life, by healing patients who request their help, and by promoting health, which is fundamental to the enjoyment of so many of life's virtues. Conversely, American society has always condemned physicians who stray from the healing path, who use their knowledge to harm, or who depart from their role as guardians of society's interest in life.[5]

[1] Hippocrates, *The Oath* (W.H.S. Jones trans., Loeb Classical Library 1923).

[2] American Medical Ass'n, *Code of Medical Ethics* § 2.211 (1994).

[3] Society's unqualified commitment to life runs throughout traditional jurisprudence. In *Blackburn v. State*, 23 Ohio St. 146, 163 (1872), for example, the Ohio Supreme Court observed that:

> The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Accord, 4 William Blackstone, *Commentaries on the Law of England* *189 ("[t]he suicide is guilty of [an offense] against the King, who hath an interest in the preservation of all his subjects"). Similarly, this Court has acknowledged the constitutionality of such a fundamental choice for life:

> We think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . .

Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 282 (1990).

[4] Pope John Paul II, Encyclical Letter *Evangelium Vitae* ¶ 66 (March 25, 1995) (noting that life is God's gift and that suicide is a rejection of that gift; *accord*, 1 William Blackstone, *Commentaries on the Laws of England* *125 ("[l]ife is the immediate gift of God, a right inherent by nature in every individual").

On April 2, 1996, the Second Circuit departed from that tradition. Invoking an equal protection analysis, the court below held that there is no distinction between assisted suicide and the withholding or withdrawal of treatment. Pet. App. 30a-31a. The court then invalidated New York's statutory distinction between assisted suicide and the withdrawal of life support, holding that it is "not rationally related to any legitimate state interest." *Id.* at 35a.

New York now seeks review of that decision. In support, the CMA notes that the decision below directly conflicts with: (1) eighteen state supreme courts that have distinguished between assisted suicide and the withdrawal of life support; (2) the overwhelming consensus of the medical community that assisting suicide and withdrawing life support fundamentally differ; (3) this Court's decision in *Cruzan* that States may constitutionally assert an unqualified interest in life; and (4) the Michigan Supreme Court's decision in *People v. Kevorkian* [6] that prohibitions against physician-assisted suicide advance legitimate state interests.

In addition, the difficulties with the decision below are illustrated by a comparison between it and the Ninth

[5] *See, e.g., United States v. Brandt (the Medical Case)*, II Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 181 (1949); *see also United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part).

[6] 447 Mich. 436, 527 N.W.2d 714 (1994), *cert. denied*, 115 S. Ct. 1795 (1995).

Circuit's recent decision in *Compassion in Dying v. Washington*.[7] Although the Ninth Circuit's decision also invalidates a state law prohibiting assistance in suicide, the court's opinion and the opinion below each reject the rationale adopted by the other. The Ninth Circuit rejects the equal protection approach followed by the court below, and instead announces a substantive due process right to physician-assisted suicide. 79 F.3d at 816. The court below, by contrast, rejects any such due process right but then invalidates the New York statutes on equal protection grounds. Pet. App. 19a, 30a-35a. This disagreement is not surprising, because both decisions lack a proper constitutional foundation.

Review is needed now to dispel the notion, advanced by courts of appeals in two of the nation's most populous circuits, that the States are constitutionally powerless to prohibit physicians and others from promoting or assisting in suicide. Such dangerous precedents should not be permitted to percolate any further in the lower federal courts without review by this Court.

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT A STATE MAY PROHIBIT ASSISTED SUICIDE CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

While the Equal Protection Clause requires that "all persons similarly circumstanced should be treated alike, . . . [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216

[7] 79 F.3d 790 (9th Cir. 1996) (en banc), *modified*, 1996 WL 294445 (9th Cir. May 28, 1996). The Ninth Circuit's decision in *Compassion in Dying* became final on May 29, 1996. Earlier, the court of appeals, on its own motion, directed the parties to submit supplemental briefs on whether the case should be reheard en banc before all twenty-eight judges of the Ninth Circuit. On May 29, the court decided not to conduct such a hearing. On June 10, 1996, this Court stayed the Ninth Circuit's mandate, pending the timely filing and disposition of a petition for certiorari.

(1982) (internal quotations and citations omitted). Instead, disparate treatment will normally pass equal protection scrutiny if the statutory classification is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

In addressing Respondents' equal protection challenge, the court of appeals asked first whether the New York statutes at issue provide disparate treatment to similarly situated groups and then, having answered that question in the affirmative, whether the alleged "inequality" is rationally related to a legitimate state interest. Pet. App. 20a-35a. Although it is far from clear that this Court's decisions mandate such a two-step inquiry (rather than a more direct examination of whether a statutory classification is supported by a rational basis), the more fundamental problem with the court of appeals' decision is that it answers incorrectly both questions posed, and appears to apply a more stringent level of constitutional scrutiny, even while paying lip service to the "rational basis" test. As New York observes, "[t]he Second Circuit's decision creates an ill-defined new substantive constitutional right, brought forth in the name of equal protection . . . ." Pet. 13-14. This Court has previously rejected such misuse of the Equal Protection Clause, stating that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

A. Assisted Suicide Is Not The Same As The Withdrawal Of Life Support.

The moral, civil, and common law has always regarded the refusal or withdrawal of medical treatment as fundamentally different from suicide.[8] There is, moreover, an

[8] *See* Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. Det. Mercy L. Rev. 735, 753-60 (1995); Thomas J.

obvious common-sense basis for this distinction. Declining or discontinuing medical intervention so as to allow the natural order to proceed and death to come when it will is qualitatively different from prescribing or administering toxic chemicals so as to cause death by unnatural means. Yet, with the stroke of a pen, the court of appeals has chosen to equate suicide with the decision of some patients not to artificially extend their lives through medical technology. The equivalence postulated by the court of appeals is illusory.

The Second Circuit invalidated two statutes: New York Penal Law § 125.15 and New York Penal Law § 120.30 (McKinney 1995). Section 125.15 provides that "[a] person is guilty of manslaughter in the second degree when: . . . [h]e intentionally . . . aids another person to commit suicide." Section 120.30 provides that "[a] person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide."

The court of appeals began its equal protection analysis by concluding that Sections 125.15 and 120.30 treat terminally ill patients on life support differently from anyone else. How the court arrived at this conclusion, however, remains a mystery. Neither statute creates any facial classification. Instead, each merely prohibits particular conduct (*i.e.*, assisting another to commit or to attempt suicide).[9] The court purportedly discovered a surreptitious classification when it read New York's living will statute in conjunction with New York's prohibitions against assisted suicide. Pet. App. 26a-27a. Contrary to the court's view, however, neither the living will statute nor any of the other authorities cited supports a conclusion

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Marzen et al., *Suicide: A Constitutional Right?* 24 Duq. L. Rev. 1, 9-13 (1985).

[9] No record evidence suggests that either statute has been applied to disadvantage any group. Indeed, none of the parties has been prosecuted under either statute. Pet. App. 71a.

that New York has recognized a general right of its citizens to "hasten death."

The court of appeals cited the companion cases of *In re Storar*[10] and *Eichner v. Dillon* for the proposition that "the New York Court of Appeals [has] recognized the right of a competent, terminally ill patient to hasten his death upon proper proof of his desire to do so." Pet. App. 25a. An examination of *Storar* and *Eichner*, however, shows that both cases discuss the right to refuse medical treatment rather than any right to "hasten death." Indeed, the New York Court of Appeals expressly stated that:

> the State has a legitimate interest in protecting the lives of its citizens. . . . It may, by statute, prohibit them from engaging in specified activities, including medical procedures which are inherently hazardous to their lives.

52 N.Y.2d at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273. The *Eichner* Court also observed that the State's interest in preventing suicide is not implicated in the withdrawal of life support.[11]

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[10] 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

[11] 52 N.Y.2d at 377 n.6, 420 N.E.2d at 71 n.6, 438 N.Y.S.2d at 273 n.6 ("[i]n other cases the State may be able to assert additional interests, such as, prevention of suicide or, perhaps, protection of minor children or dependents. Those concerns are inapplicable here. Brother Fox's condition was not self-inflicted").

Eichner involved two members of a Roman Catholic order, Father Eichner and Brother Fox. Brother Fox was in a permanent vegetative state and dependent on a respirator. Father Eichner, Fox's religious superior and legal guardian, sought to have the respirator withdrawn. The Second Circuit's reliance on *Eichner* is particularly misplaced. Certainly Father Eichner was not asking for permission to assist in Brother Fox's suicide. It would have been morally reprehensible to him as a Catholic priest to do so.

The Second Circuit also invoked *Rivers v. Katz*[12] for the proposition that New York has recognized a right to hasten death. Pet. App. 25a-26a. Like *Storar* and *Eichner*, however, *Rivers* involved the right to refuse unwanted medical treatment.[13]

Nor do New York's living will statutes[14] establish any general right of New York citizens to hasten death. Instead, they merely codify the common law right to refuse medical treatment.[15] Indeed, the New York legislature itself drew a sharp distinction between suicide and the withdrawal of life support when it provided that:

> [t]his article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law.

New York Public Health Law § 2989 (1995).

1. *The Opinion Below Conflicts With The Decisions Of Eighteen State Courts Of Last Resort.*

New York is not alone in recognizing the distinction between assisted suicide and withdrawal of life support. In equating the two (Pet. App. 31a), the Second Circuit

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[12] 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

[13] 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 ("[i]n *Storar*, we recognized that a patient's right to determine the course of his medical treatment was paramount to what might otherwise be the doctor's obligation to provide medical care, and that the right of a competent adult to refuse medical treatment must be honored, even though the recommended treatment may be beneficial or even necessary to preserve the patient's life").

[14] New York Public Health Law art. 29-B, §§ 2960-79; New York Public Health Law art. 29-C, §§ 2980-94.

[15] *See, e.g.*, New York Public Health Law § 2964 (recognizing right of adult with capacity to consent to an order not to resuscitate), and § 2981 (allowing for appointment of an agent "to make health care decisions on principal's behalf").

placed itself into direct conflict with at least eighteen state courts of last resort. The relevant state court decisions are listed in Appendix A.

In considering whether different groups are similarly situated for equal protection purposes, this Court has often relied on "common-sense proposition[s]" regarding the relative characteristics of the persons involved. *See, e.g., Vance v. Bradley*, 440 U.S. 93, 112 (1979) (relying on "the common-sense proposition that aging—almost by definition—inevitably wears us all down"). At least eighteen state courts have similarly drawn a common-sense distinction between forgoing life support and committing suicide.

The legal distinction between suicide and the withdrawal of life support was clearly appreciated by the New Jersey Supreme Court in *In re Quinlan*, 70 N.J. 10, 43, 355 A.2d 647, 665, *cert. denied*, 429 U.S. 922 (1976). In *Quinlan*, the guardians of a young comatose woman sought permission to withdraw the artificial means of life support that were keeping her alive. Faced with the argument that such a course would amount to suicide or homicide, the New Jersey Supreme Court responded that it "would see a real distinction between the self-infliction of deadly harm and a self determination against artificial life support or radical surgery, in the face of irreversible, painful and certain imminent death." 70 N.J. at 43, 355 A.2d at 665. The court further observed that "there would be no criminal homicide" in removing Ms. Quinlan's ventilator because her "ensuing death would not be homicide but rather expiration from existing natural causes." 70 N.J. at 51, 355 A.2d at 669-70.

The New Jersey Supreme Court later addressed assisted suicide and the withdrawal of life support in *In Re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). This time the court squarely held that "declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide." 98 N.J. at 350-51, 486 A.2d at 1224.

With medical science's increasing ability to sustain life through artificial means, state statutes allowing individuals to express their willingness to forgo such means of life support have proliferated. All 50 states and the District of Columbia have enacted living will statutes distinguishing the withdrawal of life support from assisted suicide. These statutes are listed in Appendix B. Against the background of such laws, other state courts have followed *Quinlan*'s lead. The Arizona Supreme Court, for example, specifically ruled that "[a]sserting the right to refuse medical treatment is not tantamount to committing suicide." *Rasmussen v. Fleming*, 154 Ariz. 207, 218, 741 P.2d 674, 685 (1987).

Likewise, in *De Grella ex rel. Parrent v. Elston*, the Kentucky Supreme Court contrasted " '[m]ercy killing' and 'euthanasia' or any other 'affirmative or deliberate act to end life' [which] are fundamental violations of the common law," with "withdrawal of nutrition and hydration from a person . . . in a persistent vegetative state . . . [which] is medically recognized as fitting the definition of 'permit[ing] the natural process of dying' . . . ." 858 S.W.2d 698, 707 (Ky. 1993). The New York Court of Appeals has embraced the same distinction. *See Fosmire v. Nicoleau*, 75 N.Y.2d 218, 227, 551 N.E.2d 77, 82, 551 N.Y.S.2d 876, 881 (1990) ("merely declining medical care, even essential treatment, is not considered a suicidal act").[16]

Quinlan's progeny have often confronted fundamental state law questions in drawing their distinction between withdrawing life support on the one hand and suicide or euthanasia on the other. The Louisiana State Constitution, for example, includes an explicit prohibition against euthanasia. La. Const. art. I, § 20 ("No law shall subject any person to euthanasia . . . ."). Nevertheless, the Louisiana Supreme Court has drawn a principled distinc-

[16] For a comprehensive study of New York's historic opposition to assisted suicide, see John A. Alesandro, *Comment: Physician-Assisted Suicide and New York Law*, 57 Alb. L. Rev. 820 (1994).

tion between euthanasia and withdrawing life support. *See In re P.V.W.*, 424 So.2d 1015, 1022 (La. 1982) (holding that "[t]hese extraordinary means of preserving a person's 'existence' in an irreversible vegetative coma have little to do with the continuation or the ending of 'life', and removal of such systems under highly restricted circumstances cannot reasonably be construed as violative of the constitutional prohibition against euthanasia").

Not only do the States agree that withdrawal of life support differs from suicide, but they generally agree on why this is so. Beginning with *Quinlan*, state courts have consistently held that when life support is removed, the patient's preexisting condition, and not the removal of the life support, is the legal cause of death. *See, e.g., Quinlan*, 70 N.J. at 51, 355 A.2d at 669-70. By contrast, the person who ingests a lethal substance causes his own death; there is no preexisting condition to blame. Following such reasoning, the Florida Supreme Court held that "suicide is not an issue when . . . the discontinuance of life support 'in fact will merely result in [the patient's] death, if at all, from natural causes.' " *In re Browning*, 568 So.2d 4, 14 (Fla. 1990) (citation omitted). The Maine Supreme Court agreed that a patient's "decision to live without artificial life-sustaining procedures would not constitute suicide since the grievous injuries resulting in his present condition were not self-inflicted. . . . His decision not to receive [medical procedures], far from constituting suicide, is a choice to allow to take its course the natural dying process set in moion by his physiological inability to chew or swallow." *In re Gardner*, 534 A.2d 947, 955-56 (Me. 1987) (citations omitted). Finally, the Washington Supreme Court expressly disassociated itself from an endorsement of suicide or euthanasia, though finding that a patient has a right to withhold medical or artificial life support devices. The court reasoned that "in none of these cases can the withholding of life sustaining devices be deemed the cause of [the patient's] death. The cause of her death

will be [the] disease." *In re Grant*, 109 Wash. 2d 545, 563-64, 747 P.2d 445, 455-56 (1987), *modified on other grounds*, 757 P.2d 534 (Wash. 1988); *accord*, *In re Colyer*, 99 Wash. 2d 114, 123, 660 P.2d 738, 743 (1983).

The Second Circuit apparently misunderstood this causation analysis, which turns on the fundamental tort law distinction between cause in fact and legal or proximate cause. Although withdrawal of life support may be the "but for" cause of a patient's death, the law has long recognized a valid distinction between cause in fact and proximate or "responsible" cause. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42, at 273 (5th ed. 1984). Although in both instances an act of the doctor or the patient may be the "but for" cause of the patient's death, in suicide the act will also be the proximate cause. From any common-sense perspective, it is not irrational to say that a person who either refuses life support or requests that it be withdrawn dies from his preexisting condition, while the person who ingests deadly medicine dies at his own hand. That is why state court after state court has rejected the equivalence asserted by the court below between suicide and withdrawing life support. In the words of the Wisconsin Supreme Court, "No one can dispute that the withdrawal of treatment, especially artificial feeding, will result in the death of a patient. However, it is equally indisputable that the result is the natural death of the body," *In re L.W.*, 167 Wis. 2d 53, 81, 482 N.W.2d 60, 71 (1992); *see also* 167 Wis. 2d at 92, 482 N.W.2d at 75 ("[r]efusing medical treatment is not suicide").

2. *The Opinion Below Conflicts With The Overwhelming Consensus Of The Medical Community.*

The medical community has traditionally drawn a sharp distinction between physician-assisted suicide and withdrawing the means of life support. As the American Medical Association, for example, has observed:

> [t]he withdrawing or withholding of life-sustaining treatment is not inherently contrary to the principles of beneficence and nonmalficence [*sic*]. The physician is obligated only to offer sound medical treatment and to refrain from providing treatments that are detrimental, on balance, to the patient's well-being. When a physician withholds or withdraws a treatment on the request of a patient, he or she has fulfilled the obligation to offer sound treatment to the patient. The obligation to offer treatment does not include an obligation to impose treatment on an unwilling patient. In addition, the physician is not providing a harmful treatment. Withdrawing or withholding is not a treatment, but the forgoing of a treatment.

AMA Council on Ethical and Judicial Affairs, *Code of Medical Ethics: Current Opinions* (1994). Similarly, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical & Behavioral Research, has commented that:

> [a]lthough competent patients . . . have the legal and ethical authority to forgo some or all care, this does not mean that patients may insist on particular treatments. The care available from health care professionals is generally limited to what is consistent with [professional standards].

President's Commission for the Study of Ethical Problems in Medicine and Biomedical & Behavioral Research, *Deciding to Forgo Life-Sustaining Treatment* 44 (1982).

For decades, medical, ethical, and religious leaders have drawn distinctions between suicide and the withdrawal of increasingly invasive treatment options. Pope Pius XII, for example, concluded in 1957 that physicians, consistent with a patient's wishes, could ethically withdraw a respirator under certain circumstances.[17] Pope

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[17] Pope Pius XII, *The Prolongation of Life, reprinted in* L'Osservator Romano, Nov. 25-26, 1957; *accord*, Sacred Congregation for the

Pius reasoned that, in such circumstances, death would result not from the removal of the respirator, but from the underlying condition or illness.

Significantly, against the accumulated wisdom of the medical, ethical, and religious communities, the Second Circuit failed to cite even one medical organization or text supporting its conclusion that withdrawing life support is the equivalent of assisted suicide. Instead, the court relied on a student law review note for this proposition.[18]

The consensus of the courts and the medical community is clear: Refusing medical treatment and ingesting toxic drugs are not the same. As this Court observed in *Cruzan*, the right to refuse medical treatment emerges from the right to bodily integrity and a corollary of the doctrine of informed consent (*i.e.*, the right to withhold consent). 497 U.S. at 269-70. Refusing life support, or

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Doctrine of the Faith, *Declaration on Euthanasia* 12 (Boston: Daughters of St. Paul 1980); *see also* Pope John Paul II, Encyclical Letter *Evangelium Vitae* ¶ 65 (March 25, 1995) ("[e]uthanasia must be distinguished from the decision to forgo so-called 'aggressive medical treatment' . . . . To forgo extraordinary or disproportionate means is not the equivalent of suicide or euthanasia").

[18] Pet. App. 30a (*citing* Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 Harv. L. Rev. 2021, 2028-31 (1992)). The court also cited Justice Scalia's concurrence in *Cruzan* for the "irrelevance of the action-inaction distinction." *See* 497 U.S. at 296-97. The court failed to recognize, however, that Justice Scalia's remark was made in the course of an opinion in which he urged that the Constitution does not provide any basis for disturbing legislative choices in this area. Although Justice Scalia saw the "action-inaction distinction" as an inadequate ground for overturning, under the Fourteenth Amendment, Missouri's decision not to permit the termination of life support for an unconscious patient, he readily acknowledged that the distinction "has some bearing upon the legislative judgment of what ought to be prevented as suicide . . . ." Justice Scalia thus endorsed a state legislature's prerogative to draw precisely the kind of distinction that the court of appeals in this case declared nonexistent.

indeed any medical treatment, thus involves the right to be free from bodily invasion and the right to consent to the medical treatment one receives. *Id.*[19] Such rights are not in any way implicated in a patient's request for toxic drugs.

B. States Have Legitimate Interests In Prohibiting Assisted Suicide.

Even if this Court were to determine that New York's statutory scheme classifies similarly situated groups, that scheme should still be upheld because it is rationally related to a legitimate government interest. Review under the rational basis standard "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). In discussing rational basis scrutiny, this Court has stated that:

> the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

Under rational basis scrutiny, therefore, legislation is presumed valid. *Cleburne*, 473 U.S. at 440 "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute

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[19] *People v. Kevorkian*, 527 N.W.2d at 732 n.59 (patients "may refuse life-sustaining medical treatment because the treatment itself is a violation of bodily integrity").

is rationally related to a legitimate state interest"). Only if such legislation is irrational will the Court invalidate it. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988) ("social and economic legislation . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality").

The court below, however, stated that "[t]he general rule . . . is that state legislation carries a presumption of validity *if* the statutory classification is 'rationally related to a legitimate state interest.'" Pet. App. 21a (citation omitted; emphasis supplied). This precisely reverses the proper principles of equal protection review. The presumption of validity does not depend on the outcome of the constitutional scrutiny; rather it is the premise from which that scrutiny is to proceed. In any event, the court of appeals was wrong in concluding that states lack a legitimate governmental interest in prohibiting physician-assisted suicide.

The court of appeals' application of the rational basis standard appears to have been distorted by the court's improper consideration of quality of life issues. The court used those considerations to discount the State's important interest in the protection and preservation of human life. Pet. App. 31a ("[s]urely the state's interest lessens as the potential for life diminishes"). The Second Circuit's conclusion that government's interest in life must be adjusted to take into account an assessment—ultimately, a judicial assessment—of the quality of that life directly conflicts with this Court's holding in *Cruzan*:

> We think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . .

497 U.S. at 282. As the Supreme Court of Missouri said, in the decision affirmed by this Court in *Cruzan*,

> the state's interest is not in quality of life. The state's interest is an unqualified interest in life. In striking the balance between a patient's right to refuse treatment or her right to privacy and the state's interest in life, we may not arbitrarily discount either side of the equation to reach a result which we find desirable.

Cruzan v. Harmon, 760 S.W.2d 408, 422 (Mo. 1988) (en banc).

Disregarding this point, the court of appeals ignored the State's interest in protecting all citizens and proceeded instead as if the only relevant state interest is one that varies with the subjective quality of life. The court thus implicitly denied that all lives remain under the full protection of the law. This simply cannot be reconciled with *Cruzan*. As Justice Scalia observed in his concurrence in that case,

> [t]he life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

497 U.S. at 295 (Scalia, J., concurring), *quoting Blackburn v. State*, 23 Ohio St. 146, 163 (1873).

The Second Circuit's opinion also conflicts with the Michigan Supreme Court's opinion in *People v. Kevorkian*. The Michigan court there observed that:

> [the same state] interests in the sancity of life that are represented by the criminal homicide laws *are threatened by one who expresses a willingness in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim.*

447 Mich. at 488 n.68, 527 N.W.2d at 736 n.68 (emphasis supplied). Although the court then went on to

question the severity of murder prosecutions of assisted suicide, the court viewed as undeniable the existence of some legitimate government interest in protecting all citizens.[21]

The fact that most states criminalize assisted suicide supports the conclusion that government has a legitimate interest in regulating such activity. At least forty-one States, Puerto Rico, and the Virgin Islands impose criminal penalties on those who assist another to commit suicide. The relevant statutes and decisions are listed in Appendix C. As Justice Scalia observed in *Cruzan*, "American law has always accorded the State the power to prevent, by force if necessary, suicide . . . ." 497 U.S. at 293 (Scalia, J., concurring). Indeed, all fifty States have involuntary commitment statutes seeking to prevent suicide through the confinement of those who pose a danger to themselves.[22] If the States constitutionally may confine someone who poses a suicide threat, then surely the States may prevent the same person from obtaining a physician's aid in carrying out the threat.

In his concurrence below, Judge Calabresi seems to suggest that government interests fade over time and that the New York legislature needs to take "affirmative step[s] reaffirming the prohibition." Pet. App. 44a. This is, to put it mildly, a dubious basis for constitutional adjudication. In any event, New York has done precisely what Judge Calabresi asks.

New York periodically calls together a task force to discuss bio-medical issues. Convened by the Governor, it

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[21] The New York legislature has opted to punish assisted suicide as manslaughter rather than murder. New York Penal Law § 125.15 (McKinney 1995).

[22] *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) ("all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of non-deadly force to thwart suicide attempts").

brings together legislative, legal, and ethical experts to re-examine the State's interest in various such issues. In one of its most recent sessions, the Task Force concluded that:

> [a]ssisted suicide would carry us into new terrain. . . . We believe that the practices would be profoundly dangerous for large segments of the population, especially in light of the widespread failure of American medicine to treat pain adequately or to diagnose and treat depression in many cases. The risks would extend to all individuals who are ill. They would be most severe for those whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, or membership in a stigmatized social group. The risks of legalizing assisted suicide and euthanasia for these individuals . . . are likely to be extraordinary.

New York State Task Force on Life and the Law, *Life Sustaining Treatment: Making Decisions and Appointing a Health Care Agent* vii-viii (July 1987).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. FRANK
SERGIO ALVAREZ-MENA, III
PETER BUSCEMI *
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* Counsel of Record

JUNE 1996

APPENDIX

APPENDIX A

The state courts of last resort that have distinguished between withdrawal of life support and assisted suicide include the following:

In re Fiori, 673 A.2d 905, 910 (Pa. 1996)
People v. Kevorkian, 447 Mich. 436, 472-73, 527 N.W.2d 714, 728-29 (1994), *cert. denied*, 115 S. Ct. 1795 (1995)
Thor v. Superior Court, 5 Cal. 4th 725, 742, 855 P.2d 375, 385, 21 Cal. Rptr. 2d 357, 367 (1993) (en banc)
DeGrella ex rel. Parrent v. Elston, 858 S.W.2d 698, 707 (Ky. 1993)
In re L.W., 167 Wis. 2d 53, 83, 482 N.W.2d 60, 71 (1992)
In re Doe, 411 Mass. 512, 522, 583 N.E.2d 1263, 1270, *cert. denied*, 503 U.S. 950 (1992)
In re Lawrence, 579 N.E.2d 32, 40 n.4 (Ind. 1991)
McKay v. Bergstedt, 106 Nev. 808, 823, 801 P.2d 617, 627 (1990)
In re Browning, 568 So. 2d 4, 14 (Fla. 1990)
Fosmire v. Nicoleau, 75 N.Y.2d 218, 227 n.2, 551 N.E.2d 77, 82 n.2, 551 N.Y.S.2d 876, 881 n.2 (1990)
State v. McAfee, 259 Ga. 579, 580, 385 S.E.2d 651, 652 (1989)
In re Estate of Longeway, 133 Ill. 2d 33, 41, 549 N.E.2d 292, 296 (1989)
McConnell v. Beverly Enters., 209 Conn. 692, 710, 553 A.2d 596, 605 (1989)
In re Grant, 109 Wash. 2d 545, 563-64, 747 P.2d 445, 454-55 (1987), *modified on other grounds*, 757 P.2d 534 (Wash. 1988)
In re Gardner, 534 A.2d 947, 955-56 (Me. 1987)
Rasmussen v. Fleming, 154 Ariz. 207, 218, 741 P.2d 674, 685 (1987)

In re Conroy, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985)
In re P.V.W., 424 So. 2d 1015, 1022 (La. 1982)

A number of state lower courts also draw a distinction between suicide and withdrawing life support. *See, e.g., Donaldson v. Lundgren*, 2 Cal. App. 4th 1614, 1621, 4 Cal. Rptr. 2d 59, 62 (1992); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1144-45, 225 Cal. Rptr. 297, 306 (1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220, 225 (1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1012, 195 Cal. Rptr. 484, 487 (1983); *Foody v. Manchester Mem. Hosp.*, 40 Conn. Supp. 127, 137, 482 A.2d 713, 720 (1984); *In he Severns*, 425 A.2d 156, 158 (Del. Ch. 1980); *Satz v. Perlmutter*, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980); *In re Rosebush*, 195 Mich. App. 675, 681 n.2, 491 N.W.2d 633, 636 n.2 (1992); *In re Eichner*, 102 Misc. 2d 184, 205, 423 N.Y.S.2d 580, 594 (Sup. Ct. 1979), *aff'd as modified sub nom. Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (App. Div. 1980), *aff'd as modified sub nom. In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); *Leach v. Akron General Med. Ctr.*, 68 Ohio Misc. 1, 10, 426 N.E.2d 809, 815 (Ct. Com. Pl. 1980); *In re Fiori*, 438 Pa. Super. 610, 619, 652 A.2d 1350, 1354 (1995) (en banc), *aff'd*, 673 A.2d 905 (Pa. 1996).

APPENDIX B

The state living will statutes that distinguish between withdrawal of life support and assisted suicide include the following:

Ala. Code § 22-8A-10 (1995)
Alaska Stat. § 18.12.080(f) (1995)
Ariz. Rev. Stat. Ann. § 36-3210 (1995)
Ark. Code Ann. § 20-17-210(g) (Michie 1995)
Cal. Health & Safety Code § 7191.5(g) (West 1995)
Colo. Rev. Stat. Ann. § 15-18-112(1) (West 1995)
Conn. Gen. Stat. Ann. § 19a-575 (West 1995)
Del. Code Ann. tit. 16, § 2507 (1995)
D.C. Code Ann. § 6-2430 (1995)
D.C. Code Ann. § 21-2212 (1995) (durable power of attorney for health care)
Fla. Stat. Ann. § 765.309(1) (West 1995)
Ga. Code Ann. § 31-32-9 (1995)
Ga. Code Ann. § 31-36-2 (1995) (durable power of attorney for health care)
Haw. Rev. Stat. § 327D-13 (1995)
Idaho Code § 39-161(1) (1995) (do not resuscitate orders)
Ill. Comp. Stat. ch. 755, para. 35/9(f) (Smith-Hurd 1995)
Ill. Comp. Stat. ch. 755, para. 40/50 (Smith-Hurd 1995) (durable power of attorney for health care)
Ind. Code Ann. § 16-36-4-19 (West 1995)
Ind. Code Ann. § 16-36-1-13 (West 1995) (durable power of attorney for health care)
Iowa Code Ann. § 144A.11.6 (West 1995)
Iowa Code Ann. § 144B.12.2 (West 1995) (durable power of attorney for health care)
Kan. Stat. Ann. § 65-28,109 (1995)
Ky. Rev. Stat. Ann. § 311.637 (Michie/Bobs-Merrill 1995)
La. Rev. Stat. Ann. § 1299.58.10 (West 1995)
Me. Rev. Stat. Ann. tit. 18-A, § 5-813 (West 1995)

Md. Code Ann., Health-Gen. § 5-611 (1995)
Mass. Gen. Laws Ann. ch. 201D, § 12 (West 1995) (durable power of attorney for health care)
Mich. Comp. Laws Ann. § 700.496(20) (West 1995) (durable power of attorney for health care)
Minn. Stat. Ann. § 145B.14 (West 1995)
Miss. Code Ann. § 41-41-117(2) (1993)
Mo. Ann. Stat. § 459.059(5) (Vernon 1995)
Mont. Code Ann. § 50-9-205(7) (1995)
Neb. Rev. Stat. § 20-412(7) (1995)
Nev. Rev. Stat. § 449.670(2) (1993)
N.H. Rev. Stat. Ann. § 137-H:10(II) (1995)
N.J. Stat. Ann. § 26:2H-54(e) (West 1995)
N.M. Stat. Ann. § 24-7-8 (Michie 1996)
N.Y. Pub. Health Law § 2989(3) (McKinney 1995) (durable power of attorney for health care)
N.C. Gen. Stat. § 90-320(b) (1995)
N.D. Cent. Code § 23-06.4-01 (1995)
N.D. Cent. Code § 23-06.5-01 (1995) (durable power of attorney for health care)
Ohio Rev. Code Ann. § 2133.12(d) (Baldwin 1996)
Okla. Stat. Ann. tit. 63, § 3101.12(g) (West 1995)
Or. Rev. Stat. § 127.570 (1995)
20 Pa. Cons. Stat. Ann. § 5402(b) (1995)
R.I. Gen. Laws § 23-4.11-10(f) (1955)
R.I. Gen. Laws § 23-4.10-9(f) (1995) (durable power of attorney for health care)
S.C. Code Ann. § 44-77-130 (Law. Co-op. 1993)
S.D. Codified Laws Ann. § 34-12D-20 (1996)
Tenn. Code Ann. § 32-11-110 (1995)
Tex. Health & Safety Code Ann. § 672.020 (West 1995)
Utah Code Ann. § 75-2-1118 (1995)
Vt. Stat. Ann. tit. 18, § 5260 (1995)
Va. Code Ann. § 54.1-2990 (Michie 1995)
Wash. Rev. Code Ann. § 70.122.100 (West 1995)
W. Va. Code § 16-30-10 (1995)

Wis. Stat. Ann. § 154.11(6) (West 1995)
Wyo. Stat. § 35-22-109 (1995)
Wyo. Stat. § 3-5-211 (1995) (durable power of attorney for health care).

APPENDIX C

The following thirty-seven states and territories have statutes that impose criminal penalties for assisting a suicide:

Alaska Stat. § 11.41.120(a)(2) (1995)
Ariz. Rev. Stat. Ann § 13-1103(A)(3) (1995)
Ark. Code Ann. § 5-10-104(a)(2) (Michie 1995)
Cal. Penal Code § 401 (West 1995)
Colo. Rev. Stat. § 18-3-104(1)(b) (West 1995)
Conn. Gen. Stat. Ann. § 53a-56(a)(2) (West 1995)
Del. Code Ann. tit. 11, § 645 (1995)
Fla. Stat. Ann. § 782.08 (West 1995)
Ga. Code Ann. § 16-5-5(b) (1995)
Haw. Rev. Stat. § 707-702 (1995)
Ill. Comp. Stat. ch. 720, para. 5/12-31 (Smith Hurd 1995)
Ind. Code Ann. § 35-42-1-2.5(b) (West 1995)
Iowa Code Ann. §§ 707A.2, 707A.3 (1996)
Kan. Stat. Ann. § 21-3406 (1995)
Ky. Rev. Stat. Ann. § 216.302 (Baldwin 1995)
La. Rev. Stat. Ann. § 14:32.12 (West 1995)
Me. Rev. Stat. Ann. tit. 17-A, § 204 (West 1995)
Mich. Comp. Laws Ann. § 752.1027 (West 1995)
Minn. Stat. Ann. § 609.215 (West 1995)
Miss. Code Ann. § 97-3-49 (1993)
Mo. Ann. Stat. § 565.023(1)(2) (Vernon 1995)
Mont. Code Ann. § 45-5-105 (1993)
Neb. Rev. Stat. § 28-307 (1995)
N.H. Rev. Stat. Ann. § 630:4 (1995)
N.J. Stat. Ann. § 2C:11-6 (West 1995)
N.M. Stat. Ann. § 30-2-4 (Michie 1995)
N.Y. Penal Law § 120.30 (McKinney 1995)
N.Y. Penal Law § 125.15 (McKinney 1995)
N.D. Cent. Code § 12.1-16-04 (1955)
Okla. Stat. Ann. tit. 21, § 813 (West 1995)
Or. Rev. Stat. § 163.125(b) (1995)

18 Pa. Cons. Stat. Ann. § 2505 (1995)
P.R. Laws Ann. tit. 33, § 4009 (1990)
S.D. Codified Laws Ann. § 22-16-37 (1996)
Tenn. Code Ann. § 39-13-216 (1995)
Tex. Penal Code Ann. § 22.08 (West 1995)
V.I. Code Ann. tit. 14, § 2141 (1994)
Wash. Rev. Code Ann. § 9A.36.060 (West 1995)
Wis. Stat. Ann. § 940.12(West 1995).

The following two states have negligent homicide statutes broad enough to penalize assisting a suicide: Ala. Code § 13A-6-4 (1995); and Wyo. Stat. § 6-2-107 (1995).

The following five states have case law authorizing the imposition of criminal penalties for assisting a suicide: *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *Commonwealth v. Bowen*, 13 Mass. 356 (1816); *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961); *Blackburn v. State*, 23 Ohio St. 146 (1872); and *State v. Jones*, 86 S.C. 17, 67 S.E. 160 (1910).